



on August 9, 2007, arose out of his employment with respondent and resulted in left hip and low back injuries, for which he claims a 17 percent whole person functional impairment and a 50 percent work disability. Claimant notes that the issues of timely notice and his right to future medical treatment also need to be addressed as the ALJ only went so far as to find that he failed to sustain his burden of proof that the August 9, 2007 falls arose out of his employment. The ALJ did not address the issues dealing with timely notice, claimant's right to future medical treatment and the nature and extent of claimant's injuries and disability.

Respondent argues that the Award should be affirmed.

#### **FINDINGS OF FACT**

Claimant resides in Slidell, Louisiana in a retirement community. Claimant is 84 years old. He was 79 years old on the date of the alleged accidents. Claimant's job with respondent was as a multi-disciplined engineer assigned to work with FEMA to examine flood damaged properties. Claimant testified that he was hired by respondent to come to Kansas to review flood damaged water treatment plants around Coffeyville. Claimant flew from Mississippi to Tulsa, Oklahoma, spent the night in Tulsa, and then the next morning rented a car and drove to Kansas.

Claimant showed up for work on August 8, 2007. At approximately 1:30 p.m., claimant went on a tour of a sewage treatment plant. The plant tour lasted for about two hours. Claimant testified that it was a very hot day with a heat index of 106 degrees, he had nothing to drink and he was sweating. At one point, he asked for a drink which was accommodated. Claimant testified that he was not used to that kind of heat having come from Louisiana where it was 86 degrees. Claimant then left work and went to his motel. The remainder of his evening is not detailed in this record. There is an indication in the record that claimant had difficulty finding a motel and may not have had much sleep that night.

On Wednesday, August 9, 2007, claimant came to work at 7:00 a.m. His office was air conditioned and was near a water cooler. Claimant worked until noon and then went to lunch. After lunch claimant went to Walmart and purchased water. He was not feeling well so he went back to his motel and took a nap. After the nap, he went back to the office, but "toppled over" on his way into the office. Some people from the office went to claimant's assistance. He drank some water and worked for a while on his report of the previous day's assessment. Later claimant left for his motel. However, on the way to his car, he passed out in the parking lot. The second fall was witnessed by a nurse practitioner waiting for her ride. After the second fall, claimant was taken to the emergency room at the Mercy Health System Hospital in Independence, Kansas, where he stayed overnight. X-rays failed to show any damage or injury.

Claimant was released the next day. He sought a referral to a massage therapist and went for a massage. He returned to his motel and slept. The next day claimant woke up and couldn't move. He again went to the hospital, this time by ambulance, and was diagnosed with a fractured hip. Surgery was performed to repair the fractured hip. Claimant called respondent, was released from the hospital after 10 days and went home.

Claimant claims that on August 9, 2007, he fell two times while in the course of his employment. Claimant testified that he was on the premises of iParametrics (respondent) on both occasions when he fell. Claimant had worked for respondent iParametrics for three days when he fell.

Claimant testified that he contacted respondent and informed them of the situation. He was told by a lady named Dusty from the insurance department not to worry, everything would be taken care of, but that he needed to admit that the accident was his fault. After surgery he got a call from a representative of respondent's workers compensation department. He was asked to recount what happened. He did and was told that the accident was his fault and not compensable. He responded that he didn't feel that it was his fault and that he hadn't done anything unusual that day. Claimant said that the doctors told him it was heat stroke.<sup>1</sup> Claimant testified that his main concern was getting back to work because at his age it is hard to find a job and he wanted to continue to work.

Claimant's complaints are in his back and hip, which he attributes to the accident in August 2007. Claimant testified that he never had a conversation with respondent about the accident and the only thing they asked about was how he was going to get their car back. Claimant has a history of heart attacks. He had heart surgery in 1999. Right before he made the trip to Kansas, claimant stopped his blood pressure medication. Claimant also has a history of back problems, receiving back treatments beginning in the mid 90's. Claimant's medical bills from the two falls were taken care of through his private insurance. Claimant has had several different physicians for his various medical issues.

Claimant stopped working for respondent in August 2007, not long after the accident. He obtained a job at Kessler Air Force Base on a short-term basis from August through November 2008. Claimant last worked on November 26, 2008, after the Air Force job ended. That job was a part-time assignment with Northrop Grummon in Biloxi, Mississippi. Claimant was hired as an environmental engineer tasked with rewriting the base's storm water prevention plan. Claimant continued to look for work after this, but found it difficult to find anything due to his age. Claimant has not worked anywhere since November 26, 2008.

Claimant testified to having congestive heart failure and has a pacemaker. Claimant alleges that this condition developed after the accident. Claimant testified that he doesn't

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<sup>1</sup> Claimant's Depo. at 26.

drive on the interstate anymore because his pacemaker acts up and has almost knocked him down two or three times. Claimant testified that the majority of his health issues have been since his visit to Kansas. This includes a failed back surgery in 2010, that has him unable to ambulate without a walker. Claimant's wife also has health issues and therefore they live in a retirement home. Claimant denied having any chronic diseases before the accident. But he admits to a history of hypertension and of having his first heart attack in 1981.<sup>2</sup> Claimant also has a pre-respondent history of high blood pressure, quadruple bypass surgery, gall bladder surgery, low back problems, skin cancer and prostate cancer. Claimant testified that he would again like to try prolotherapy for his back because he believes it will help him, as it did when he tried it several years back. This is not advised by his doctors because he would have to travel and it would be considered a risk to his life to get on a plane with his pacemaker.

Claimant testified that he can only recall one time before his falls in August 2007 where he experienced an episode of dizziness, and he claims that was due to running out of his potassium pills.<sup>3</sup> Claimant believes this took place in June 2006, when over the course of three days he had a series of syncopal episodes. Claimant denies that any of his medical conditions had anything to do with his falls in August 2007.

Claimant met with Dr. Poppa at the request of his attorney for an examination, on January 9, 2009. Claimant reported pain in his left hip and low back. Claimant's history and presented medical records were consistent with dizziness and a fall on August 9, 2007, resulting from exposure to record heat. Dr. Poppa noted that despite surgery, claimant continued to have problems with the hip and lumbar spine. Claimant was using a cane to ambulate when Dr. Poppa met with him. Claimant indicated that he had not used a cane before the accident. Dr. Poppa opined that at the time of the examination claimant was at maximum medical improvement regarding his work-related left hip and lumbar spine injury.

Dr. Poppa stated that claimant's injury, with residuals involving the left hip and lumbar spine, were a direct and proximate result of his work-related accident. He testified that the employment caused or substantially contributed to claimant's present hip and back conditions as well as the need for the treatment he received. Dr. Poppa opined that claimant got dizzy and fell. He was not sure how long claimant had been exposed to the heat. He did not attribute that to heat stroke, but recognized that it was hot on the date of the accident.

The history provided to Dr. Poppa indicated that claimant was outside in 106 degree heat, began to feel dizzy and blacked out at his office door, falling on his hip and low back.

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<sup>2</sup> R.H. Trans. at 32.

<sup>3</sup> R.H. Trans. at 23.

Later that day claimant fell again in the grass. Claimant didn't indicate that he had suffered any prior episodes of dizziness or syncopal episodes (passing out).<sup>4</sup> Dr. Poppa testified that the falls in 2007, with the resulting hip and low back problems stemmed from claimant's employment with respondent, including the heat exposure on August 9, 2007. The history provided to Dr. Poppa did not indicate that claimant was exposed to the heat on one day and that the falls occurred the next day. Dr. Poppa initially testified that a delay in symptoms after exposure to heat would be expected to last only a few hours. He was unaware that the heat exposure was the day before. He believed the exposure was the same day as the falls and the heat symptoms were spontaneous, meaning they occurred on the day of the falls.<sup>5</sup>

Dr. Poppa was questioned regarding medical records showing that claimant had been examined in an emergency room on June 8, 2006, following a loss of consciousness four days prior and of having spells of lightheadedness every few months. Claimant had stayed overnight in a hospital for a syncopal episode. A report from August 2006 indicated similar dizzy spells. Dr. Poppa was unaware that claimant had adjusted his blood pressure medication just before coming to Kansas. Dr. Poppa agreed that a change in blood pressure medication could cause dizziness, but if the medication is working properly there should be no problems. Even considering the contrary medical information, Dr. Poppa opined that most probably it was the heat which caused claimant to fall at work. He testified that "I believe he was probably still affected the following day as well. It takes time for the body to recover".<sup>6</sup>

Dr. Poppa recommended that, related to the left hip, claimant should avoid ladder climbing, working on unprotected heights or walking on uneven surfaces, and should avoid repetitive bending, stooping or squatting greater than on an occasional basis.

Dr. Poppa went on to assign claimant a 17 percent whole person impairment (5 percent whole person impairment for the lumbar spine; and 31 percent impairment (13 percent whole body) to the left leg (17 percent impairment to the left leg for decreased strength; 5 percent impairment to the left leg for aggravation of a pre-existing hip condition, secondary to the work injury; 7 percent impairment to the left leg for trochanteric bursitis; 5 percent impairment to the left leg secondary to pain complaints associated with surgery).

Claimant met with board certified orthopedic surgeon James C. Butler, M.D., on February 1, 2010, at the request of respondent's insurance carrier. The history provided to Dr. Butler indicated that claimant was walking in above 100 degree weather and had a

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<sup>4</sup> Poppa Depo. at 15-16.

<sup>5</sup> Poppa Depo. at 23.

<sup>6</sup> Poppa Depo. at 13.

“heatstroke” causing him to faint.<sup>7</sup> Claimant then passed out for a second time while walking to his car after work. Claimant’s prior medical history included heart attacks, heart failure and high blood pressure. Medical records provided to Dr. Butler indicated dizzy spells from 2006, an overnight hospital stay for a syncopal episode, low back pain including narrowing of the lumbar spine at L5-S1 with degenerative changes in the lumbar vertebral bodies and evidence of a disc protrusion at L4-5 and at L5-S1 in 1999. Claimant had a 2-3 day history of a syncopal episode with fever, chills and falling in 2006.

Dr. Butler stated that claimant complained of daily pain in his left hip that required the use of a cane to ambulate. Claimant reported that after returning to New Orleans post surgery, he developed low back pain. He wasn’t sure if this was related to the fall. Claimant had lumbar surgery in Mississippi, in November 2009. Ultimately, Dr. Butler testified that there was no relationship between claimant’s low back and hip conditions and the accident in 2007.

Dr. Butler stated that it was his understanding that due to claimant’s exposure to heat on the date of accident, claimant experienced symptoms of heat stroke. However, there was nothing in claimant’s records to indicate that he suffered heat stroke. Claimant did not mention his prior history of dizziness or syncopal episodes. But medical records provided to Dr. Butler revealed that claimant had received treatment for synocpal episodes prior to the accident and was seen by Dr. Ronald Kellum in January 2007 for low back pain of several years duration. An office note from Dr. Kellum dated August 4, 2006, mentioned an overnight stay for a syncopal episode.<sup>8</sup>

Dr. Butler did not feel that exposure to heat for approximately two hours one day would lead to dizziness or a syncopal episode the following day.

Well, the symptoms of a heat stroke typically occur immediately. They are not delayed by any period of time. So that’s why if the patient is claiming that a heat stroke caused him to fall, I would not expect and think it unlikely that he would sustain a heat stroke and have symptoms the next day causing him to fall.<sup>9</sup>

Under the 4th edition of the *AMA Guides*, Dr. Butler found claimant to have a 32 percent impairment to the left lower extremity, which is equivalent to a 13 percent impairment to the body as a whole.<sup>10</sup>

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<sup>7</sup> Butler Depo., Ex. 2 at 1 (Dr. Butler’s June 13, 2011 report).

<sup>8</sup> Butler Depo., Ex. 2 at 2 (Dr. Butler’s June 13, 2011 report).

<sup>9</sup> Butler Depo. at 35.

<sup>10</sup> Butler Depo. at 22.

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>11</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>12</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>13</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>14</sup>

Claimant alleges that his falls on August 9, 2007, were the result of heat exposure on August 8, 2007, while he was touring a water treatment plant in Coffeyville, Kansas. This allegation is supported by the testimony of Dr. Poppa, claimant's hired medical expert. However, Dr. Poppa was not provided with an accurate or complete history of the circumstances leading up to claimant's fall. In addition, Dr. Poppa was not provided an accurate history of claimant's medical conditions prior to the falls. He testified that the effects of the heat exposure would last only a few hours. He later testified, after being given an accurate time table of the heat exposure and the falls, that claimant could still be feeling the effects of the heat from the day before. That was after he was informed that

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<sup>11</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>12</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>13</sup> K.S.A. 44-501(a).

<sup>14</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

his understanding of the accident and of claimant's past medical problems were inaccurate.

Dr. Butler testified that claimant's falls were not related to heat exposure the day before. He was unable, within a degree of medical probability, to find a causal relationship between the heat exposure and the dizziness and the falls. He testified that the more likely connection was with claimant's personal conditions, of which there are several.<sup>15</sup>

It is uncontested that claimant's alleged falls occurred in the course of his employment with respondent. Both occurred while claimant was on respondent's premises and during his normal work hours. However, the large question is whether claimant's alleged accidents arose out of his employment.

In *Hensley*,<sup>16</sup> the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. This analysis is similar to the analysis set forth in 1 *Larson's Worker's Compensation Law*, § 7.04[1][a] (2006). The simplest explanation for the compensability of an accident due to a neutral risk is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

The risks falling into the first category are universally compensable. The risks falling in the second category do not arise out of the employment and are not compensable.<sup>17</sup> The risks of the third category are considered neutral and are compensable. The question in this matter is whether the falls alleged by claimant were either due to risks associated with the job, i.e. the exposure to the heat the day before, or were due to unexplained neutral risks.

While claimant contends a connection exists between the heat and the fall, the evidence in this record does not support his claim. Dr. Poppa testified to a connection between the fall and the heat. However, Dr. Poppa was provided not only an inaccurate history of the events leading to the falls, but also an inaccurate history of claimant's prior health problems. This casts doubt upon his medical opinions. Dr. Butler determined that claimant's prior health problems were the more likely culprit in this instance. In his opinion, the exposure to the heat the day before was not related to the falls. The Board finds that the more likely cause of the falls was claimant's prior health problems. His history of falls,

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<sup>15</sup> Consider *Dial v. C. V. Dome Co.*, 213 Kan 262, 515 P.2d 1046 (1973).

<sup>16</sup> *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979); see also *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d. 5, 61 P.3d 81 (2002).

<sup>17</sup> *Martin v. U.S.D.* 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).



dizziness and at least one syncopal episode convince the Board that the falls were the result of a condition personal to claimant. Therefore, compensability must be denied.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that he suffered personal injury by accident which arose out of his employment with respondent.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated March 20, 2012, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2012.

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BOARD MEMBER

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BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge